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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

PETERSEN ENERGÍA INVERSORA,  
S.A.U. and PETERSEN ENERGÍA,  
S.A.U.,

Plaintiffs,

v.

15 CV 2739 (LAP)

ARGENTINE REPUBLIC and YPF,  
S.A., ,

Conference

Defendants.

New York, N.Y.  
July 20, 2016  
11:05 a.m.

Before:

HON. LORETTA A. PRESKA,

District Judge

APPEARANCES

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, PLLC  
Attorneys for Plaintiffs  
BY: MARK C. HANSEN  
DEREK T. HO

AKERMAN LLP  
Attorneys for Defendant  
BY: MARTIN DOMB  
BENJAMIN R. JOELSON

CHADBOURNE & PARKE LLP  
Attorneys for Defendant YPF S.A.  
BY: THOMAS J. HALL  
MARCELO BLACKBURN

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(Case called)

MR. HANSEN: Thank you, your Honor. Mark Hansen, H-a-n-s-e-n, of Kellogg Huber Hansen Todd Evans & Fiegel in Washington, D.C., for the plaintiffs.

THE COURT: Who else?

MR. DOMB: Good morning. Martin Domb, D-o-m-b. You have my card. From the Akerman firm for the Republic of Argentina.

MR. HALL: Thomas Hall from Chadbourne & Park LLP, on behalf of defendant, YPF S.A. Good morning, your Honor.

THE COURT: Good morning.

(Discussion off the record)

THE COURT: Could we start by going through the bylaws and figuring out what the timeline would/should be for a tender offer and what triggers what and how it would work.

So, Mr. Hansen, maybe you could start if you want.

MR. HANSEN: Thank you, your Honor. Good morning. Mark Hansen for the plaintiffs as I mentioned a minute ago.

I think, in answer to your question, your Honor, the bylaws provide that there's a time sequence that an acquirer of shares, such as the Republic of Argentina, if it's going to acquire a percentage as stated in the bylaws, it has to issue a tender for the minority shares as the parties contracted.

THE COURT: The question is more detailed than that. Let's go through each step. It had been my understanding that

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1 the first obligation in time sequence is for the party wishing  
2 to acquire shares to give notice. Am I wrong on that?

3 MR. HANSEN: Well, I think it's -- to be specific,  
4 your Honor, the section is Section 7 of the bylaws.

5 THE COURT: Right.

6 MR. HANSEN: And just being very specific, Section  
7 7(c) says there's an information duty: Any person who shall  
8 directly or indirectly acquire by any means more than 3 percent  
9 shall notify the corporation within five days as from the  
10 acquisition to cause such person to report such circumstances.

11 THE COURT: So the acquirer may acquire shares up to  
12 that amount and within five days has to notify the company?

13 MR. HANSEN: That's what this says, your Honor.

14 THE COURT: Okay. The next thing that happens is  
15 what?

16 MR. HANSEN: This then goes on to say if the terms  
17 of -- then it says: If the terms of subsections (e) and (f)  
18 are not required for, you can't require. So you go to Section  
19 (e). The person wishing to do a takeover, that's defined as a  
20 certain amount, shall (1) obtain a prior consent of special  
21 shareholders meeting of class A shareholders and (2) arrange a  
22 takeover bid for the acquisition of all the shares of all the  
23 classes of the corporation and all securities convertible into  
24 shares. And then (f) each takeover bid shall be conducted in  
25 accordance with the procedure herein stipulated and, to the

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1 extent that applicable regulations in the jurisdictions where  
2 the takeover bid takes place and the provisions of the stock --

3 THE COURT: Mr. Hansen, you want this taken down?

4 MR. HANSEN: I do, your Honor.

5 THE COURT: I know you're reading, but don't forget  
6 the court reporter.

7 MR. HANSEN: Thank you, your Honor. I apologize.

8 At any rate, it goes on to provide the procedures  
9 which we've outlined in our briefs, your Honor. That's what  
10 happens in time sequence.

11 THE COURT: Including in subsection (f)(i), the bidder  
12 shall notify the corporation in writing about the takeover bid  
13 at least 15 days in advance of the bid?

14 MR. HANSEN: Yes, your Honor.

15 THE COURT: There didn't seem to be other strict time  
16 requirements. There in 7(c) it's the notification to the  
17 corporation within five days of the acquisition that reached  
18 the aggregate amount specified; right?

19 MR. HANSEN: Yes, your Honor.

20 THE COURT: And then (e) just says arrange a takeover  
21 bid. So we don't know when that might have to be; is that  
22 right?

23 MR. HANSEN: Right, your Honor.

24 THE COURT: So that the takeover bid or the tender  
25 offer could be made after -- under this would be made after the

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1 time the acquirer acquires that percentage of the stock; is  
2 that right?

3 MR. HANSEN: Yes, your Honor. And we know that, among  
4 other reasons, because the bylaws speak to what happens if the  
5 acquirer has gained a position in the shares but hasn't yet  
6 completed the takeover.

7 THE COURT: Right. And is that an obligation visited  
8 on the company? Company can't allow the vote, etc., etc.; is  
9 that right?

10 MR. HANSEN: It's visited both on the shareholder and  
11 the company. As our Spanish law expert, our Argentine law  
12 expert explains, and I believe it's not really a contested  
13 proposition, the bylaws are a contract between the shareholders  
14 and between the company and the shareholders. So it's an  
15 obligation on both the shareholders who are acquiring and on  
16 the company.

17 THE COURT: And if the Republic had acquired the  
18 shares, let's just say, in the open market, the obligations  
19 would be the same?

20 MR. HANSEN: Yes, your Honor. Not only that, your  
21 Honor, if another acquirer -- if Carl Icahn was to pick an  
22 acquirer, anyone who would have done this would have the same  
23 obligation.

24 THE COURT: Your expert argues that the tender offer  
25 is not incompatible with expropriation or intervention because

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1 the tender offer is a unilateral action "not subject to any  
2 condition or time period that might delay or jeopardize either  
3 the temporary taking or the expropriation," and that's from his  
4 declaration at paragraph 68.

5 Is that consistent with the timeline we've talked  
6 about and that is imposed in the Section 7?

7 MR. HANSEN: I believe completely, your Honor, and for  
8 the following reason: The structure, and as our expert says  
9 and I think we've argued in our brief, Argentina was fully able  
10 to conduct its expropriation of the Repsol shares, and it did  
11 so. If we took the time to go through the expropriation law,  
12 which I assume we'll do at some point this morning, we'll see  
13 they very surgically did only one thing. They stepped into the  
14 shoes of Repsol for 51 percent of the shares. Tendering is not  
15 inconsistent with that, indeed required by that, because  
16 they've maintained with respect Article 15 of the expropriation  
17 law all the commercial arrangements that were in place in YPF.  
18 They chose to run it as a public corporation and not to change  
19 it.

20 So as our expert says and we believe as even more  
21 trenchantly the FSIA cases say, it's a distinct obligation.  
22 The obligation to comply with the contract is distinct from  
23 taking over the Repsol shares. So there's no time  
24 inconsistency. As you say, they could do it at various stages.  
25 The bylaws contemplate it being done a certain way. There's no

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1 condition precedent such that the shares don't even get  
2 acquired. The shares are acquired. It's a severable and  
3 distinct obligation that the Republic of Argentina or Carl  
4 Icahn has to comply with, and they did not.

5 THE COURT: Okay. Mr. Domb, do you disagree with the  
6 timeline that Mr. Hansen has suggested?

7 MR. DOMB: Yes. And I'd like to show the Court why  
8 not only under the bylaws but under Petersen's own expert's  
9 report.

10 THE COURT: Let's go.

11 MR. DOMB: Should I take the podium?

12 THE COURT: Whatever you want. You can both stay at  
13 your seats. Whatever's more comfortable for you.

14 MR. DOMB: I think the Court has put your finger on  
15 the key issue, which is the timing of the tender offer versus  
16 the takeover. And by "takeover," I'm using that as a  
17 shorthand; I mean the sovereign act of the April decree by the  
18 executive branch followed three weeks later by the  
19 congressional law of expropriation specifically for this case,  
20 both conducted under the constitutional power of takeover and  
21 the general law of expropriation which were followed. All of  
22 those acts --

23 THE COURT: I'm not sure any of that is much in  
24 contention. So how about the timeline question?

25 MR. DOMB: Okay. I'll go straight to Dr. Bianchi,

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1 paragraph -- this is Peterson's expert. He uses the word  
2 "prior to," paragraph 31 of his declaration. I don't know if  
3 you have that handy. 31(ii), prior to a takeover, the acquirer  
4 is required to carry out the TO. Up above on the same page,  
5 paragraph 28, he uses the word "previously." So "previously"  
6 and "prior." Rovira, the other Petersen expert, says the same  
7 thing in paragraph 42.

8 THE COURT: Could I just ask you to go back to Section  
9 7 and tell me -- I actually don't really care what the experts  
10 say. I want to see in the agreement how it's supposed to work.

11 MR. DOMB: I started with the expert because they are  
12 interpreting the bylaws, of course, as we all must. And in the  
13 bylaws, I would point out four provisions, your Honor.

14 THE COURT: Yes, sir.

15 MR. DOMB: 7(d) forbids a person from acquiring  
16 control of a certain percentage of shares or control of the  
17 company without complying with the tender offer provisions. So  
18 there's a prohibition. 7(e) requires a person bidding for  
19 control to arrange a takeover bid. I insert the word "first"  
20 because it's implicit there, and Bianchi and Rovira also did.

21 THE COURT: Seven which?

22 MR. DOMB: 7(e).

23 THE COURT: Say it again please.

24 MR. DOMB: 7(e) requires a person bidding for control  
25 to first arrange for a takeover bid.



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1 THE COURT: Okay.

2 MR. DOMB: And I add that Bianchi and Rovira agree  
3 that this has to precede, the tender offer has to precede, the  
4 acquisition of control.

5 7(f) is a long section that has all of the  
6 requirements, we looked at only a piece of it, which has a  
7 15-day requirement. But if you read that entire section, it  
8 has all of the requirements for what the tender offer --  
9 details of the tender offer have to be given by the acquiring  
10 person to the board of directors before launching the tender  
11 offer, and the board may reject the takeover bid. Again, all  
12 of that is consistent with the concept that the tender offer  
13 must precede the acquisition of control.

14 And, finally, your Honor, 7(h). 7(h) is a remedies  
15 provision within the bylaws, and it says that if a person  
16 acquires control without complying with the tender offer  
17 provision, that person would not be entitled to dividends or  
18 voting rights to exercise the rights of a shareholder. Well,  
19 all of that is inconsistent and invalidates the government's  
20 sovereign power to take over the company because the bylaws, on  
21 the one hand, the bylaws as interpreted by Petersen, are saying  
22 you may not take over control unless you first do this tender  
23 offer and follow all these procedures, get board control, and  
24 so on. Well, in April of 2012, the government --

25 THE COURT: I got it.

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1 MR. DOMB: -- took over.

2 THE COURT: We're just arguing right now about the  
3 timeline. I got it.

4 What do you say?

5 MR. HANSEN: Proves our point, your Honor. We'll  
6 start with (h). Clearly, they can acquire the shares, but  
7 they're supposed to not vote until they complete the takeover,  
8 the tender offer. And so the timeline is there. There is a  
9 timeline, but it's not inconsistent with doing the tender, as  
10 Mr. Domb has suggested. And I'll tell you why in four, I  
11 think, simple ways, your Honor.

12 First, the significance of it is, well, their argument  
13 is they've impliedly expropriated the tender rights by  
14 acquiring the Repsol shares. In other words, it's  
15 inconsistent. That's the premise of their argument. But, in  
16 fact, the expropriation law makes very clear they have not done  
17 that, and as our expert maintains, you can't do that without  
18 actually saying: We're expropriating the tender rights, and  
19 we're going to pay for them. Remember, your Honor, when they  
20 expropriate the Repsol shares, they have to commit to pay for  
21 them. They don't expropriate our tender rights and for good  
22 reason; they don't want to pay for them.

23 Second, your Honor, it's not inconsistent at all with  
24 their sovereign power to take the Repsol shares to then do the  
25 tender. It's a separate obligation; and, indeed, the bylaws

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1 make clear it's a separate obligation.

2 THE COURT: Can I just ask you, though, what do you  
3 say to Mr. Domb's suggestion that the tender offer has to  
4 precede the expropriation, and he's calling it a condition  
5 precedent that he says is inconsistent with the state's  
6 sovereign ability to expropriate?

7 MR. HANSEN: Two arguments, your Honor. The only  
8 reason he can make that argument, and I think I heard him do it  
9 by inserting a word. And he did; he inserted the word "first"  
10 after "arrange" in 7(e)(2). So, again, you have to do violence  
11 to the bylaws to even make the argument. The argument doesn't  
12 say it's a condition precedent. It doesn't say that  
13 acquisitions made without doing the tender are invalid. It  
14 just simply provides a mechanism to try to encourage people to  
15 do it. And as 7(h) shows, if you don't do it, you're not  
16 supposed to vote your shares.

17 The second point of your Honor's point and Mr. Domb's  
18 argument, well, it's the inconsistency point. It isn't because  
19 the expropriation law makes very clear, all they want to do --  
20 and I'll go through it point by point if you want, your  
21 Honor -- 7, 8, 15, and 16 say we are taking the Repsol shares,  
22 maintaining the company as a public trading company, and  
23 everything else stays in place. In other words, they could  
24 have chosen more broadly to say we're taking other rights.  
25 They chose not to, ergo there's no inconsistency to them saying

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1 we want the shares. The shares come with whatever rights they  
2 come with. And we have these other commercial obligations  
3 we're leaving in place.

4 And that's the core of our position, your Honor. When  
5 the commercial arrangements and contracts remain in place, they  
6 have to comply with them, and there's no necessary  
7 inconsistency. It's just a money issue. All they have to do  
8 is pay for some additional shares. Doesn't prevent them from  
9 exercising control; doesn't prevent them from carrying out  
10 their policy. It just means they have to do what they've  
11 contracted to do. It's no different, your Honor, from *Guevara*  
12 and *Weltover* and the cases that talk about if the government  
13 seeks to buy bullets.

14 THE COURT: I understand.

15 MR. HANSEN: So, in other words, we don't see any  
16 inconsistency. It's a supplemental obligation they can easily  
17 perform. They just choose not to. It's not as if we're  
18 saying: Oh, no, there's a bylaw provision that says your  
19 shares evaporate and your acquisition has no effect. That's  
20 not what we're saying. We're saying you got the shares. We're  
21 not contesting.

22 THE COURT: I got it.

23 Mr. Domb.

24 MR. DOMB: Yes. I continue to say that the timing is  
25 a key issue of our position, and I disagree and I want to make

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1 two points on that. If I may sit down so I can look at my  
2 notes?

3 THE COURT: Yes, sir.

4 MR. DOMB: I want to contrast what Petersen said in  
5 its complaint and what its experts say what the bylaws say, on  
6 the one hand, which I say proves our position that the tender  
7 offer has to precede the takeover, with what Petersen is  
8 arguing in its motion papers and now, which is different. As I  
9 pointed out before, Bianchi says "previously" and "prior."  
10 These are quotes from his declaration.

11 THE COURT: Okay.

12 MR. DOMB: Rovira says "before." And hold on a  
13 second. But in their memo of law, Petersen uses the word  
14 "then" and "later." So the inconsistency is in their position  
15 what the actual -- what the complaint, their experts, and the  
16 bylaws say and what Petersen is saying.

17 Another point, your Honor, on the same date that this  
18 case was filed, which was in April of 2015, Petersen, through  
19 its Spanish bankruptcy trustee, sent an official notice to the  
20 president of Argentina, and that is item 21 in my declaration.  
21 You'll note that it has English and Spanish side by side. This  
22 is a notice of the very same claims that are asserted in this  
23 action. They are asserted under a bilateral treaty, or BIT.  
24 I'd like to point the Court to language in here that also  
25 addresses the timing, among other things. And that begins at

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1 the very bottom of page 4 with the word "the" and continues on  
2 page 5, and I quote:

3 "The government's illegal actions included, inter  
4 alia, the de facto and unlawful seizure of YPF's operations,  
5 the unilateral appointment of the intervenor, the unilateral  
6 transfer of powers granted by the bylaws to the company's board  
7 and president to the intervenor, the replacement of the  
8 legitimate members of YPF's board of directors with the  
9 government's own handpicked members, the termination of the  
10 dividend distribution policy previously agreed between the  
11 shareholders and enforced by all YPF shareholders and board  
12 members, as well as the confiscation of Repsol's controlling  
13 shareholder interest without first complying with the public  
14 tender offer tender provision of YPF's bylaws to which the  
15 government had approved and agreed to comply. These government  
16 measures, inter alia, violated the Republic's obligations under  
17 the BIT toward the investors in Argentina."

18 This paragraph from Petersen itself says again that  
19 the tender offer has to come first. It lists all of the  
20 government acts which we say, and I think are undisputed, are  
21 sovereign acts. It says those are your violations, and it has  
22 hurt us, Petersen, in Argentina.

23 MR. HANSEN: I believe that's pretty far afield, your  
24 Honor.

25 THE COURT: It really is. And, by the way, doesn't --

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1 MR. DOMB: I don't understand why this is far afield,  
2 your Honor. This is --

3 THE COURT: Counsel. Counsel.

4 MR. DOMB: This is Petersen on the same day that they  
5 filed this lawsuit.

6 THE COURT: Can I just say I really don't care what  
7 they said. The question is what do the bylaws say? I don't  
8 see that the "first" is in there. I don't see that it's  
9 inconsistent. And doesn't paragraph (h), the remedy paragraph,  
10 isn't that just as consistent an explanation of the language  
11 you just read to me; right? The company shouldn't have  
12 taken -- shouldn't have permitted all of those actions just  
13 read off because the tender offer had not been effected?

14 MR. DOMB: Exactly. And I think (h) proves our point,  
15 and let me try one more time to say why.

16 (h) says if you -- and it could be anyone I agree,  
17 Argentina or anyone else -- take control of the company as  
18 defined here and you have not complied with the tender offer  
19 provisions, then you may not exercise shareholder rights and  
20 dividend rights. Well, Argentina, by decree and law, took over  
21 the company, exercised shareholder rights, exercised dividend  
22 rights without taking a tender offer. So the sovereign acts of  
23 Argentina conflict with the bylaws. And as our experts --

24 THE COURT: I don't see that it necessarily has to.  
25 What do you say to Mr. Hansen's suggestion that they are not

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1 necessarily inconsistent?

2 MR. DOMB: Well, I -- sorry.

3 THE COURT: That, in this instance, for example, the  
4 Republic could have taken the 51 percent and then offered to  
5 tender for the rest.

6 MR. DOMB: Well, that may have happened, but the  
7 bylaws don't do it that way. The bylaws said you have to get  
8 board control. Remember in 7 -- all of the procedures under 7,  
9 I believe it's (f), 7(f) lay out all of the procedures. I  
10 believe it's true, I haven't re-checked this, that the 15-day  
11 period may be the only specific time frame listed there. But  
12 even that 15-day period says that notice has to be given in  
13 advance. And the rest of 7(f) provides -- and I don't know  
14 exactly where, but I know that I picked this out that it says  
15 that the board may disapprove.

16 So it's saying that under these bylaws, we can thwart  
17 Argentina's sovereign act of takeover if you haven't gone  
18 through all of these hoops before you do it. Well, that's  
19 impossible. Our expert, Dr. Mata, as well as the two experts  
20 that YPF put forward, Drs. Marcer and Kemelmajer, all agree  
21 that the bylaws are inconsistent with the takeover. I would  
22 add that Bianchi and Rovira also agree in their use of the  
23 "previously" and "before." And under Argentine law -- and, by  
24 the way, these bylaws are the bylaws of an Argentine  
25 corporation which must be construed under Argentine law, just



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1 as if we were dealing with a Delaware corporation, we would be  
2 applying Delaware law. And our experts and YPF's experts say  
3 under Argentine law, it is very well-accepted we have public  
4 law and we have private law.

5 THE COURT: I really --

6 MR. DOMB: When Congress enacts in the public law  
7 field, it unfortunately can undo, supersede, rights that are  
8 granted by private law.

9 THE COURT: Counsel, what do you say particularly to  
10 the argument counsel makes about the possibility that the board  
11 of directors will reject the bid? And that's in (f)(ii).

12 MR. HANSEN: I think my first response, your Honor, is  
13 it's irrelevant to our case. It didn't happen; wasn't pled.  
14 All that happened in our case is they acquired the Repsol  
15 shares, and they had a tender obligation. Had there been some  
16 other thing happen, if you could hypothesize some other state  
17 of events, we'd have to analyze how and why that would be  
18 somehow inconsistent. But remember that I think the only  
19 relevant point to the argument ultimately is to support this  
20 notion of the implied expropriation, I think, as Mr. Domb just  
21 referenced, if we didn't say we expropriated these rights but  
22 we impliedly did so because having to comply with our  
23 contractual obligations is inconsistent with what we sought to  
24 do. And I'd be happy to take your Honor through the  
25 expropriation law.

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1 All they sought to do was acquire 51 percent of the  
2 shares with the rights that came with those shares; left  
3 everything else in place. As your Honor pointed out a minute  
4 ago, nothing whatsoever inconsistent about acquiring that  
5 position and then doing the rest of the things your commercial  
6 contracts required you to do. Remember that Argentina erected  
7 all these contractual provisions to assure investors that their  
8 rights would be maintained. That was a commitment of  
9 Argentina. Argentina did not in any way, shape, or form void  
10 that obligation, take it away, impliedly or expressly. It  
11 remained a contractual obligation. Whether the directors could  
12 have done something, would have done something, I don't know,  
13 your Honor, but I do know what did happen, which is they got  
14 51 percent of the shares.

15 And even in the various expropriation laws, if you  
16 look at Section 7 of the expropriation law, if you look at  
17 Section -- which says basically all we're doing is we're  
18 getting Repsol shares, that's 7. If you look at Article 13 of  
19 the expropriation law, it says we will exercise the rights of  
20 those shares. In other words, they're not getting super  
21 shares.

22 THE COURT: So your position would be different if  
23 the -- and forgive me for misnaming -- but if the statute  
24 pursuant to which the expropriation took place, if it also  
25 said: And we've decided that for the good of the country we're

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1 not going to -- we are not going to undertake the tender offer?  
2 They could do that. They could have done that; right?

3 MR. HANSEN: The answer is of course they could have  
4 done that, your Honor. And as our expert --

5 THE COURT: And then you'd be in the soup.

6 MR. HANSEN: Actually, your Honor, we wouldn't, and I  
7 can explain why.

8 THE COURT: Okay.

9 MR. HANSEN: I don't think it's necessary to your  
10 determination of this motion. So I caution you that this is  
11 where we're sort of off on a hypothetical here. But in the  
12 matter of intellectual honesty, I don't think what you've just  
13 specified as a hypothetical would be any different from the  
14 government, for example, in the bullets case cited. They say,  
15 You know what, we've decided in the interest of our sovereign  
16 goodness that we don't want to pay for bullets. It impairs our  
17 war effort. And I think what all our foreign sovereign  
18 immunity cases say is you, your Honor, will determine the  
19 nature of the conduct; it's not how the foreign states are  
20 characterizing it. If it's commercial conduct, it's still  
21 commercial conduct, even if a government passes a law that says  
22 we're just not going to comply because it's for the good of the  
23 realm.

24 THE COURT: Your position would be weaker had they  
25 done that.

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1           MR. HANSEN: It would definitely be harder, your  
2 Honor, no question. But I firmly believe it's the right  
3 position. You couldn't nationalize a bullets contract. You  
4 couldn't nationalize a bail contract. But it's easy here, your  
5 Honor, because -- and I think --

6           THE COURT: Because they didn't. I got.

7           MR. HANSEN: And I think it's important to understand  
8 why they didn't, because as Bianchi explains, under Argentine  
9 law if you expropriate something, you have to do two things:  
10 You have to identify it.

11          THE COURT: You have to pay for it. I got it.

12          MR. HANSEN: Thank you, your Honor.

13          MR. DOMB: Your Honor, the law -- I disagree again,  
14 because the law does give Argentina explicitly the right to  
15 exercise dividend and shareholder rights of the --

16          THE COURT: Of the 51 percent.

17          MR. DOMB: Yes. And, remember, the bylaws said: Thou  
18 shalt not doing this without first doing a tender offer, and if  
19 you do, you may not exercise those rights. So the bylaw is  
20 putting Argentina in the position of not enabling it to carry  
21 out a sovereign power. It couldn't. And, by the way, I'm  
22 referring to Article 9 in the law that says you may exercise  
23 all of the political rights of the shares.

24                 Since the bullet hypothetical came up, let me please  
25 address that, because it's in their briefs. We have the exact

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1 opposite of the bullet hypothetical, which comes out of an  
2 Eleventh Circuit case.

3 THE COURT: How so?

4 MR. DOMB: Okay. In the bullet hypothetical, the  
5 country entered into a contract to buy bullets contingent on  
6 its --

7 THE COURT: Going to war.

8 MR. DOMB: -- first going to war.

9 THE COURT: I got it.

10 MR. DOMB: Okay. In that case the country was free to  
11 either declare war or not declare war. If it did, it was bound  
12 by the bullets contract. Here, we have the exact opposite  
13 because the bylaws are saying you may not declare war unless  
14 you first do a tender offer. So it's putting the condition  
15 ahead of the declaration of war. It's the opposite.

16 THE COURT: Is that argument contingent upon reading  
17 the bylaws to require that the tender offer take place first?

18 MR. DOMB: Yes. And that is a strong position that we  
19 vigorously maintain, and there are several factors that alluded  
20 to it. The complaint links them. Both Petersen's experts link  
21 them by their own words.

22 THE COURT: Counsel.

23 MR. DOMB: Okay.

24 THE COURT: I got it. You told me five times.  
25 Sometimes I need two or three.

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1 MR. DOMB: There's one new point, your Honor.

2 THE COURT: Can I talk?

3 MR. DOMB: I'm sorry.

4 THE COURT: May I talk?

5 Sometimes I need two or three times, but it doesn't  
6 help if you tell me five times.

7 MR. DOMB: I have one --

8 THE COURT: And I've told you three times I care more  
9 about what the bylaws say than about what they might have said  
10 in their complaint or in their letter or anything else. We  
11 have to look at the bylaws.

12 What else did you want to add?

13 MR. DOMB: The other point is, again, evidence that  
14 the claim -- this all goes to the gravamen of the complaint  
15 which the Court, of course, has to determine. And the other  
16 point I would point to as showing that the gravamen of the  
17 complaint is on the sovereign act is that Petersen lost its  
18 shares in May of 2012 when they were foreclosed because  
19 Petersen had borrowed, essentially, all of the money to buy the  
20 shares. And when there was that initial takeover by decree and  
21 also three weeks later by law, that put Petersen in default  
22 because change of control was a default. And when they didn't  
23 get the dividend that they expected in May from which they  
24 would service their loans, and that's in the complaint, they  
25 lost their shares in May.

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1 THE COURT: This is your causation argument now?

2 MR. DOMB: Well, but I'm not -- yes, but I'm using it  
3 for the gravamen point. The point is that that has nothing to  
4 do with the tender offer. Petersen lost its shares because of  
5 the lack of a dividend which was, again, a sovereign act not  
6 tied to the tender offer. And all of that happened by the end  
7 of May.

8 THE COURT: What do you say to the gravamen argument,  
9 counsel?

10 MR. HANSEN: The gravamen argument, the basis of this  
11 is a breach of contract to tender for the shares, plain and  
12 simple, after a long course of commercial conduct. They  
13 contractually committed --

14 THE COURT: I know that's your position. How do you  
15 distinguish counsel's position? Why is he wrong?

16 MR. HANSEN: Well, we're on his causation argument  
17 now, as you alluded to, and here's why he's wrong. Our  
18 complaint says, and our complaint controls here, with all  
19 respect, your Honor, that we lost our shares because they  
20 didn't do what contractually they were required to do. Had  
21 they come in, in April and May of 2012 and complied with their  
22 obligations, we would have had no problem with our lenders.  
23 It's a matter of common sense. The lenders are not going to  
24 come down on us with a ton of bricks if we're getting  
25 \$2 billion or \$3 billion imminently. The reason why the

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1 lenders came down on us is because the Republic of Argentina  
2 announced to the world it wasn't going to do that.

3 Mr. Domb says: Oh, that's not what really happened.  
4 What really happened is this, this, this. You know what?  
5 That's fine. Someday we'll have an interesting and detailed  
6 argument about all the facts, but certainly on a 12(b)(6), your  
7 Honor, our complaint allegations, which are fully plausible  
8 under *Twombly*, must control and not Mr. Domb's  
9 counter-narrative.

10 MR. DOMB: This proves our point about the timing of  
11 the tender offer versus the takeover. The lenders didn't wait  
12 to see if or whether Argentina would then or later do a tender  
13 offer.

14 THE COURT: But there had been a lot out in the media,  
15 and I'd forgotten what that juicy quote is where some official  
16 said: We'd have to have been stupid to do that. Anyone who  
17 believed that we were going to tender was stupid. It's not  
18 like they foreclosed on them the next morning with no  
19 information.

20 MR. DOMB: Well, okay. I know what you're referring  
21 to.

22 THE COURT: That's in the complaint.

23 MR. DOMB: But, nevertheless, whatever the government  
24 may announce, they didn't wait; the lenders didn't wait. They  
25 went on some announcement, and they foreclosed.



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1           By the way, who are the lenders? The main lender was  
2 Repsol who sold the shares to Petersen; had a self-interest in  
3 getting repaid.

4           THE COURT: But, of course, any lender would.

5           MR. DOMB: Right.

6           THE COURT: It's your position that the relationship  
7 between the public law and the private law essentially  
8 immunizes all of the decisions surrounding the expropriation?

9           MR. DOMB: Yes. You're stating it in a little bit  
10 slanted way; but, obviously, they're so linked together. Even  
11 to take your last point that the government announced early on,  
12 let's say, that they weren't going to do a tender offer, it  
13 proves that the government's sovereign act was tied up with the  
14 tender offer. And if you're looking for the gravamen of the  
15 complaint -- and as the Court knows, you don't do this claim by  
16 claim or element by element. You look at the complaint as a  
17 whole -- to us it's very clear that the bylaw tender offer  
18 provision is completely tied up with the sovereign acts. They  
19 happen at the same time, as a result of the same actions. The  
20 quotations I read you from Petersen's notice of claim to the  
21 president bind them together. And I won't repeat myself.

22           THE COURT: But, counsel, I think your adversary  
23 argues in the brief, had Argentina purchased the 51 percent on  
24 the open market and also failed to tender, they would still  
25 have a claim based on the breach of contract. It's not

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1 necessarily the expropriation, is it?

2 MR. DOMB: Well, that makes a ton of difference, I  
3 will agree. And our expert, Dr. Mata, said that the bylaw  
4 provision under Argentine law applies to all instances in which  
5 Argentina acts in the marketplace. It could have bought the  
6 shares from Repsol. It could have gone in the marketplace and  
7 bought them, and then, yes, there would have been an obligation  
8 because there you're talking about all commercial activity.  
9 But here, we had sovereign activity intercede.

10 THE COURT: But doesn't that prove that the gravamen  
11 of the complaint is not the expropriation but rather the  
12 failure to tender?

13 MR. DOMB: No. We say it proves just the opposite  
14 because they were bound together, and the bylaws --

15 THE COURT: I didn't understand that. That sounds  
16 like a conclusion.

17 MR. DOMB: Well, the gravamen, as we say it is, that  
18 the government took over the company -- again, "took over" used  
19 in the sense I said before -- without making a tender offer.  
20 And so Petersen itself binds it, and it is bound together in  
21 the facts. I think the complaint --

22 THE COURT: I'm not sure I saw any of the cases  
23 talking about bound together by the facts. The cases really  
24 seem to analyze the commercial activity standing alone. I  
25 don't see a basis for your bound-together-by-the-facts argument

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1 in the cases.

2 MR. DOMB: Well, I'm thinking one of the cases  
3 Petersen cited, *Foremost-McKesson*, which is a long case and, I  
4 believe, in the D.C. circuit involving investments in Iran, in  
5 a dairy in Iran. And there, the Court ruled against the  
6 foreign sovereign, but the reason was simple. The sovereign in  
7 that case had taken advantage, in a corporate context, by  
8 shutting out a minority shareholder, the U.S. investor. But  
9 the court, the D.C. circuit, pointed out there was no -- it did  
10 that purely as a commercial matter, and there was no formal  
11 decree, law, or government action that made it a sovereign act.  
12 So our case is that --

13 THE COURT: I think that's Mr. Hansen's argument. He  
14 said -- I mean, I guess I probably said there was nothing in  
15 the decree saying "and we shall not make a tender," but also,  
16 counsel's argument is that the Republic just didn't want to  
17 pay. That sounds pretty commercial.

18 MR. DOMB: Well, if the Republic had done what Iran  
19 did as a market player, we would agree, but it didn't do that.  
20 And by the way, this is not a case where an executive branch  
21 official, say, an administrator, can enter into a contract on  
22 day one and 30 days later say: I change my mind; and I, as the  
23 government official, hereby, you know, decree by sovereign act  
24 that I'm going to breach that contract. No, Argentina has a  
25 very straight law and regimen of expropriation which requires,

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1 first, that Congress find that there is a public use -- and  
2 you're nodding, so I think you've read it.

3 THE COURT: I've got that.

4 MR. DOMB: So that's the safeguard that's built in.  
5 So it's not a decision to breach a contract. It's a decision  
6 to take a sovereign act to takeover a very important part of  
7 the economy when there was no investments being done --

8 THE COURT: But there's no necessity that in order to  
9 do that, in order to acquire its 51 percent, that the Republic  
10 not tender. It doesn't have to. It isn't required.

11 MR. DOMB: It was built into the structure --

12 THE COURT: How do I know that?

13 MR. DOMB: -- of the takeover.

14 THE COURT: How do we know that?

15 MR. DOMB: Because under Argentine law, the takeover  
16 has to specifically say the property that's to be taken over.

17 THE COURT: Fifty-one percent.

18 MR. DOMB: Yes. Has to say why, has to identify the  
19 public use, and the structure that was put in authorized the  
20 purchase of 51 percent and no more. A tender offer would  
21 require the purchase of additional shares, contrary to the  
22 structure --

23 THE COURT: But there didn't have to be Congressional  
24 authorization for the tender offer.

25 MR. DOMB: In the face of the Congressional act and

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1 the act of expropriation, any tender offer would have been  
2 inconsistent with the way that the sovereign takeover was  
3 structured. Dr. Mata says that.

4 THE COURT: Counsel what about the "and no more"  
5 provision that Mr. Domb is relying on?

6 MR. HANSEN: Very important to our argument, your  
7 Honor. They surgically sought to acquire 51 percent, as you've  
8 noted, and no more. They left all the other commercial  
9 arrangements in place. And I won't read it again, but Article  
10 15 says we're leaving everything else with the public company.  
11 That included the bylaws. So as your Honor pointed out, there  
12 are contractual, preexisting contractual commercial  
13 arrangements, Argentina had made with its minority shareholder.  
14 And Argentina was a class A shareholder throughout this period,  
15 so it was a party to this agreement all along. Nothing  
16 inconsistent, as your Honor said, with them going ahead and  
17 complying with their commercial obligations.

18 As a matter of expropriation, your Honor, absolutely  
19 right, they only expropriated 51 percent because, as Mr. Domb  
20 admitted, they're only going to pay for the 51 percent. But  
21 that doesn't do anything to the commercial arrangements that  
22 are left in place.

23 To your Honor's point earlier, I want to make sure I  
24 address it, you're absolutely right that there's nothing in the  
25 case that give any support to the fundamental argument, which

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1 is the only argument they make, which is a penumbral  
2 expropriation, if you will, or some kind of --

3 THE COURT: Even counsel wouldn't have said that.

4 MR. HANSEN: But jesting aside, your Honor, in *De*  
5 *Cspel* they could have said: Look, the bailments at issue are  
6 very close to the government seizure of the art. In *Guevara*  
7 the government could have said: You know what, the reward  
8 concept is very tied up with our chasing fugitives. In  
9 *Weltover* -- we're talking about government obligations here,  
10 you know. Basically, these are all inconvenient to us. Of  
11 course it's inconvenient to a sovereign to have to comply with  
12 its contracts. But there's no basis in law for an argument  
13 that while this is an inconvenient part of our commercial  
14 obligation, so even though we haven't taken official action  
15 with respect to it, we wipe that out.

16 THE COURT: I got it. May I ask you, what is the  
17 basis for your argument that somehow YPF breached its  
18 obligations? I wasn't so sure where in Chapter 7 we saw any  
19 obligations of YPF other than not to permit the exercise of  
20 rights if the acquirer failed to tender.

21 MR. HANSEN: Thank you, your Honor. The basis for  
22 that argument is this: I believe there's a U.S. case I can  
23 cite to you. It's *WM* or something, but I think it's an  
24 unexceptional proposition that's also covered by our expert  
25 Bianchi and maybe Rovira as well, and that is this: Bylaws are

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1 contractual in nature, and they bind not only company to  
2 shareholder but shareholder to shareholder. And according to  
3 our expert, and we believe this is the correct construction of  
4 Argentine law -- and, again, this is a merits question of  
5 Argentine law, who's liable for what under this bylaw  
6 contract -- under Argentine law Section 7 applies to YPF just  
7 as much as it applies to the government. So even though it  
8 doesn't specifically say you should be the tenderer, YPF has a  
9 contractual obligation to see that that happens. It also, as  
10 your Honor noted, has a contractual obligation not to let any  
11 acquirer, whether it be Carl Icahn or the government, vote the  
12 shares until the tender offer has been done.

13           So that's a matter of Argentine law, your Honor. Now,  
14 they've got an expert that says, no, it's not Argentine law.  
15 So we have a dispute, but no one has cited any dispositive  
16 Argentine provision that supports them. At this stage of the  
17 case, your Honor, on 12(b)(6), we don't think anyone could  
18 conclude, as matter of law, that YPF was under no obligation to  
19 see to it this protection actually was carried out. Because  
20 remember the purpose, your Honor. When this was all done, it  
21 was all erected as a set of protections for minority investors;  
22 and, indeed, it's a very important protection to have not only  
23 Argentina bound but the company bound. And the company is  
24 clearly bound in the no vote instance, and we think it's bound  
25 in the tender provision as well.

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1           THE COURT: Mr. Hall, wait one second. I know you  
2 want to talk, but counsel reminded me that I did want to ask  
3 Mr. Domb. Doesn't Section 28 tell us that this very procedure  
4 was anticipated by the parties, and it was clear in Section 28  
5 that even if Argentina took over some of the stock, the tender  
6 offer still had to be effective? I mean, this is the one that  
7 is entitled "Provisions Applicable to Acquisitions by the  
8 National Government."

9           MR. DOMB: Right. And the answer is yes, this was  
10 made applicable to acquisitions by Argentina. And our expert,  
11 Dr. Mata, addressed that. This applies only where Argentina  
12 acts as a commercial player in the marketplace.

13          THE COURT: How do we know that? Doesn't say that  
14 here.

15          MR. DOMB: It doesn't say one way or the other, but  
16 under Argentine law, it's very well established. I don't think  
17 it was rebutted. I think Bianchi agreed that the government,  
18 under its constitutional framework and its law of  
19 expropriations, laws of public use supersede or can take  
20 precedence over private laws. Let's remember this is a private  
21 contract that Petersen is suing under, and we contend that it  
22 would invalidate and prevent the country from carrying out a  
23 sovereign act.

24          THE COURT: Yes, but it seems to me it would have to  
25 be necessarily inconsistent, and counsel's arguing that the



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1 tender offer is not inconsistent with the public law which said  
2 we shall acquire 51 percent.

3 MR. DOMB: I've tried my best to show you why it is  
4 inconsistent by the things I said before. Let me allude to  
5 this dividend business. The lack of a payment of dividend in  
6 May of 2012 would have happened with or without a tender offer.  
7 And the complaint puts that at issue and says you shouldn't  
8 have taken over and violated -- there was no right to dividend  
9 except under a sweetheart deal between Repsol and Petersen, but  
10 they said: We expected that dividend. You went over and you  
11 took it. You denied us our dividend which put us in a big  
12 hole. Even if a tender offer had been made after the fact, as  
13 Petersen now argues they could have done, that would not have  
14 resolved the issue of the missed dividend, and so that proves  
15 an inconsistency.

16 And I would make one other point, your Honor, in terms  
17 of the commercial aspect, because Petersen does say this is how  
18 Argentina back 23 years earlier, in '93, lured investors to buy  
19 shares. Investors, and particularly sophisticated investors,  
20 deal with country risk all the time. This bylaw did, of  
21 course, try to eliminate a large part of country risk, to the  
22 extent that a bylaw can under Argentine law, and it did that.  
23 But sovereign risk of takeover cannot be contracted away. It  
24 wasn't here. It certainly wasn't explicitly.

25 THE COURT: I don't think counsel is arguing that it

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1 can be taken away entirely. I think what counsel is arguing is  
2 under the facts of this case where the Republic determined to  
3 acquire only 51 percent, that the protections did remain in  
4 effect. I think that's what counsel's arguing. We're not  
5 doing the hypothetical of can a contract entirely eliminate the  
6 possibility of expropriation.

7 MR. DOMB: Well, our answer, and I don't want to  
8 repeat, but I think I've tried to show the various ways in  
9 which the bylaws, especially as a matter of timing, conflict  
10 with the very initial right of Argentina to put the intervenor  
11 in the company and take over even before the shares were  
12 acquired. So, in our mind, the inconsistency, the clash  
13 between the bylaws and the sovereign acts, are very clear.

14 THE COURT: Okay. Mr. Hall.

15 MR. HALL: Yes, your Honor. The plaintiffs really  
16 seem to make two claims against YPF. One is that YPF had some  
17 obligation to make a tender offer itself and separately Section  
18 7(h), that we allowed the Republic to vote. That really is the  
19 heart of the case. I'll come back to that.

20 There's nothing whatsoever in the bylaws that suggest  
21 that YPF had any obligation to make a tender. All their expert  
22 say is that under Argentine law, when multiple parties are  
23 bound by a contract, here in the bylaws, they're bound by the  
24 contract. Well, of course. That doesn't mean we each had each  
25 other's obligations to perform. The bylaws are clear that it's

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1 the acquirer -- it's the bidder that's acquiring shares that  
2 must make a tender offer. YPF was not an acquirer. It  
3 acquired those shares, bid for those shares. There's  
4 absolutely no thread of truth to that argument.

5 And 7(h) really is the heart of it, I think, and I  
6 think our position is quite simple. The May 7 expropriation  
7 law gave the government what was called temporary occupancy  
8 over these 51 percent of the shares. Those shares were still  
9 owned by Repsol, and they continued to be owned by Repsol till  
10 2014. But the public law that was passed gives the Republic  
11 all rights to those shares, the right to vote and the right to  
12 dividends.

13 THE COURT: Could I just ask, I think it is wholly  
14 irrelevant, but why did it take two years? What was that  
15 about?

16 MR. HALL: I think it was getting to a price.

17 THE COURT: I see.

18 MR. HALL: There was litigation, and they eventually  
19 agreed on a price. The law said that the acquisition wouldn't  
20 close until compensation was fixed.

21 THE COURT: Okay. You were saying that the law said  
22 that the Republic could exercise --

23 MR. HALL: All rights to those shares.

24 THE COURT: Fifty-one percent.

25 MR. HALL: Clearly under the expropriation law, when

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1 it came to June 4, the Republic had a statutory right to  
2 exercise the rights to those shares that it did.

3 Several points, your Honor. Number one is our experts  
4 made clear that under Argentine law, that public law trumped  
5 any --

6 THE COURT: We got that.

7 MR. HALL: Secondly, your Honor, and related, but is  
8 this concept of t force majeure under Argentine law, which is  
9 somewhat different than ours. Here, the event has to be  
10 unforeseeable, but there, it's either unforeseeable or  
11 unavoidable as to YPF.

12 THE COURT: Is it "or" or is it "and"?

13 MR. HALL: It's "or," your Honor. It's set forth in  
14 our expert's affidavit.

15 As to YPF, we could not have avoided the enactment of  
16 this law. We had no control whatsoever over what the Republic  
17 did. It was completely unavoidable as to us which would make  
18 any compliance with 7(h) impossible.

19 Further, your Honor, 7(h), all that says is that  
20 anyone who acquires shares in violation of the takeover  
21 provisions can't vote. At this point in time, the government  
22 had not acquired any shares. It had announced its intention to  
23 acquire shares. It acquired those shares in 2014. But in 2012  
24 it was simply acting, not as a shareholder, not as the acquirer  
25 of shares, but pursuant to the expropriation law that gave it

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1 the right to those shares in the interim.

2 THE COURT: Okay. Let me interrupt you before I  
3 forget everything you just said and ask counsel what he says.

4 MR. HANSEN: Thank you, your Honor. I think there's a  
5 very simple response. The first response is that I believe  
6 Mr. Hall's incorrect about the expropriation law. It didn't  
7 give Argentina the right to vote the shares. It gave them --  
8 and I'll go back to the expropriation law itself because I  
9 think it's very important to look at the terms. It says it  
10 gave whatever rights they had. Of course, those rights were  
11 encumbered. If you look at Article 9, it gave them the rights  
12 associated with those shares, the economic rights of the shares  
13 also in Article 9. It says in Article 13: Shall exercise all  
14 of the rights conferred upon the shares. And then it says in  
15 Article 16, the administration of shareholder -- I apologize.  
16 I've been doing this for 30 years, and I keep doing it. I  
17 apologize.

18 All to the point, your Honor, they got whatever Repsol  
19 got; that's all they took. They didn't get super shares that  
20 had more power than the Repsol shares, and Repsol's shares were  
21 encumbered by this obligation not to vote without tendering.  
22 So that's the way that one works.

23 THE COURT: So was it just -- again, probably  
24 irrelevant -- but was it the fact that no one was voting those  
25 shares in the two years?

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1           MR. HANSEN: No, no. I think, frankly, the shares  
2 were acquired. They were seized, basically. And the fact that  
3 they hadn't come to a price, for all practical purposes,  
4 Argentina had those shares, and they were treated as having  
5 those shares. But they only had those shares. They didn't  
6 have 100 percent of the shares. They didn't have super shares.  
7 They had the Repsol shares. And, again, in Article 15 they  
8 wrote very clearly to say to the world market -- remember,  
9 that's a market. Those shares are still traded today on the  
10 New York Stock Exchange -- don't worry. We're not disturbing  
11 any of the commercial arrangements in place. It's operating as  
12 public company. We're not taking anything else away. We're  
13 just taking these shares.

14           So to YPF's point, the bylaws -- they weren't  
15 required -- the shares were Repsol shares. If Carl Icahn had  
16 those shares, YPF's obligations would have been the same. YPF  
17 was in a circumstance where, according to our expert and  
18 according to what we understand Argentine law to provide, they  
19 had to see to it that tender was carried out; and, secondly,  
20 they had an obligation to make sure those shares were not  
21 voted.

22           Now let's come to the real crux of the position which  
23 Mr. Hall has. What could we do? We had a junta with a gun to  
24 our head. I think there's an easy way conceptually to get to  
25 that argument, your Honor, to see how it's wrong. Every

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1 company has a shareholder which is the controlling block  
2 shareholder. Every company has a board of directors. When the  
3 board says, Don't comply with the contract, of course the  
4 company can't comply with the contract. When the controlling  
5 shareholder says, Don't comply with the contract, of course the  
6 company can't comply, but that's not a defense. The fact that  
7 the company can't do it isn't a defense to a breach of  
8 contract. If I have 10 million --

9 THE COURT: Let me ask you again. And forgive me if  
10 I've asked you. I think I already did. The basis of the  
11 company's obligation to make the tender offer is what, and how  
12 could the company do it? How's the company going to pay for  
13 it, among other things?

14 MR. HANSEN: I may have misspoke. I don't think the  
15 company has to tender. The company has to see that the tender  
16 occurs. In other words, it's not just refusing the vote. The  
17 company's also obligated to see to it that Section 7's carried  
18 out.

19 THE COURT: How can they do that?

20 MR. HANSEN: They've committed to do it, your Honor.  
21 They're like a guarantor.

22 THE COURT: Where did they commit to do it?

23 MR. HANSEN: Where did they commit to do it? Our  
24 understanding of what the Argentine law is, that's what our  
25 expert Mr. -- the first one, Rovira, says is the bylaws bind

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1 both YPF and Argentina, both to Article 7 and other articles.  
2 So, again, it's according to the Argentine law, your Honor.  
3 It's pretty much like a guarantor. We're not saying YPF had to  
4 itself tender, but they're like a guarantor, a controlling  
5 shareholder such that they're liable if it doesn't happen. In  
6 other words, I can guarantee someone else is paying  
7 \$10 million, and if they don't do it, I'm on the hook. That's  
8 the way we understand the Argentine law, and no one is saying  
9 it's not so. No one has given you any law to the contrary.

10 There's also the specific provision saying we, as YPF,  
11 have to make sure this tender is carried out by making sure  
12 that whoever comes in and acquires this block doesn't get to  
13 vote the shares until it's done.

14 THE COURT: That's (h) now?

15 MR. HANSEN: And then that comes with the  
16 impossibility argument, your Honor. There's no impossibility  
17 argument unless every corporation that does what its  
18 controlling shareholder and board says could say: Don't blame  
19 me. The board told me to do it. Again, very important  
20 conceptually for the case. Argentina chose not to come in with  
21 guns and troops surrounding the oil fields. They chose to  
22 acquire the 51 percent of the shares and exercise the rights to  
23 those shares and leave everything else in place.

24 Your Honor, *Smith Rocke* couldn't be more on point.  
25 They may have taken over the bank, but all the arrangements are



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1 in place. They can't walk away from the loan agreements. They  
2 can't walk away from their compensation obligations in place.  
3 And here, YPF can't walk away from its obligations just because  
4 its controlling shareholder is saying don't do it. They're  
5 liable.

6 THE COURT: Thank you.

7 Mr. Hall.

8 MR. HALL: Your Honor, we did not block Argentina from  
9 voting because our controlling shareholder told us not to. We  
10 did it because the law told us we could not block them. It was  
11 Argentine law that we had to comply with, and that's clear from  
12 the affidavits.

13 Your Honor, I think you have to look at, when it comes  
14 to sovereign community, when it comes to act of state, the  
15 claim against YPF is somewhat different because there's no  
16 claim against Argentina that it had a duty to block voting.  
17 That really is the claim against us, and I think the analysis  
18 is somewhat different. I think that an act of state, basically  
19 arguing that there's nothing invalid about Argentina giving  
20 itself the right to vote, the act of state doctrine says this  
21 Court shall not adjudicate claims that requires the Court to  
22 analyze the validity of a foreign sovereign's act on its own  
23 territory. The Second Circuit *Braka v. Bancomer* case, your  
24 Honor, I think is right on point. They tried to distinguish it  
25 by saying, well, in *Braka* everything took place in Mexico even

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1     though --

2             THE COURT:   The performance was supposed to be in  
3     Mexico in that case.

4             MR. HALL:   Yes, your Honor.   And all the performance  
5     when you look at 7(h), all that performance was in Argentina.

6             THE COURT:   As to you?

7             MR. HALL:   As to us.

8             THE COURT:   What about that?

9             MR. HANSEN:   Your Honor --

10            THE COURT:   Does that make a difference?

11            MR. HANSEN:   I have a hard time conceptualizing a  
12     difference, your Honor.   I think you're right about *Braka*.  
13     It's all about basically Mexico deciding to change the payment  
14     from dollars to pesos in Mexico with no effect outside of  
15     Mexico's borders.

16            THE COURT:   And the payments were all to be made in  
17     Mexico.

18            MR. HANSEN:   Exactly, all contained within the state.  
19     And act of state disappears the minute you start talking about  
20     outside the borders of the state.   So not even possibly  
21     applicable here.   Now, as to what was supposed to happen here,  
22     here we have this long litany.   It's all about New York.   When  
23     they tender --

24            THE COURT:   The question -- we're talking about the  
25     company and --

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1 MR. HANSEN: The company has to --

2 THE COURT: I hear what you say about maybe the  
3 company did have a right to tender, but if that's not so, they  
4 certainly had to prevent the voting. Why was that not an  
5 action that took place wholly within Argentina?

6 MR. HANSEN: The company can't get the benefit of the  
7 act of state. They're not acting in state. They're a private  
8 actor. It's an incompetent -- wrong word. It's not an  
9 applicable defense the company can raise. The conduct -- the  
10 company and the government both are engaged in conduct or  
11 should have been engaged in conduct which required performance  
12 in New York: publishing the tender, delivering the tender.

13 THE COURT: I got that.

14 MR. HANSEN: The company, as we say, your Honor -- I  
15 recognize this is in dispute -- but the company and the  
16 government were both supposed to see that this tender happens.  
17 They're both supposed to march to New York and get this done.

18 THE COURT: I hear you.

19 Mr. Hall, what do you say to counsel's suggestion that  
20 the company is not entitled to invoke the act of state  
21 doctrine?

22 MR. HALL: First of all, the company is an  
23 instrumentality of the government, and I think the case law  
24 suggests it's for the issue in the case as opposed to the  
25 party. This Court cannot review at all the act of a foreign

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1 sovereign within its own territory.

2 THE COURT: But counsel's complaining about the act of  
3 the company perhaps within its territory in not preventing the  
4 voting.

5 MR. HALL: And the sole act of the company was  
6 complying with the expropriation law. I think that calls into  
7 question the validity of the expropriation law and the  
8 enforceability of the expropriation law, which I think -- in  
9 *Braka*, your Honor, the defendant there was the bank; it wasn't  
10 the government. And it was the bank that invoked act of state,  
11 and the Second Circuit agreed that was appropriate. Whether or  
12 not some tender offer had to be made in the U.S. has nothing to  
13 do with voting at the shareholder's meeting in Buenos Aires and  
14 whether we should have blocked that.

15 MR. HANSEN: Your Honor, I believe we go back to  
16 Article 15. The construct is wrong. It's not a state-owned  
17 bank. It's not a state instrumentality. Argentina  
18 specifically said to the world in Article 15: We are leaving  
19 this public company in place. So YPF is a public company in  
20 which the government is only a shareholder. Very different  
21 from what we're talking about in *Braka*. And as a public  
22 company, it has to act as a public company. It has contractual  
23 commitments, and if has a contractual commitment that it fails  
24 to discharge that has effects in the United States, it's  
25 liable, and it can't claim an act of state because a

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1 shareholder tells it to do something any more than a Carl Icahn  
2 company can defend based on the fact that Carl Icahn tells it  
3 to do something. It's a non sequitur.

4 THE COURT: May I ask you this. And maybe it's  
5 repetitive, but it seemed that the company's obligations under  
6 the bylaws had to be triggered by the formal notice from the  
7 acquirer --

8 MR. HANSEN: Your Honor, I think --

9 THE COURT: -- which never came, of course.

10 MR. HANSEN: Which is true, it never came. And I  
11 think it's a hard statute to read, the bylaws, in some  
12 respects, but I think in substance, that's not right. I think  
13 in substance the company had an obligation to keep 51 percent  
14 of the shares from voting, and it's not tied to a particular  
15 notice. I think the form shouldn't control over the substance  
16 here. I think everybody agrees that the purpose of the  
17 provision was to keep shares acquired without the tender from  
18 voting.

19 So I don't think it can be sensibly construed that as  
20 long as they haven't gotten a formal notice, they're okay to  
21 let some block of shares that Carl Icahn has bought, put him  
22 in -- I think it proves the point. Let's say he didn't deliver  
23 the notice. Could he vote his shares of 51 percent just  
24 because he hadn't provided the notice to the board? I don't  
25 think so. I think substance has to control.

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1 THE COURT: Mr. Hall.

2 MR. HALL: Your Honor, certainly the bylaws are black  
3 and white. Until we receive notice, we had to take no action  
4 with regard to the tender offer.

5 I think when it came to the voting, it's not just  
6 Section 9 of the expropriation law, it's Section 13 that says:  
7 In order to ensure the continuity of the activities associated  
8 with the exploration, production, industrialization, and  
9 refining of hydrocarbons by YPF, the Republic shall exercise  
10 all rights conferred upon those shares. And all rights were  
11 the rights held by Repsol at the time which was the  
12 shareholder.

13 Your Honor, I also think that if you focus on what the  
14 true claim is against us, 7(h), I think that implicates a  
15 different sovereign immunity analysis as well. When it comes  
16 to that claim, it is the expropriation law and the rights that  
17 it gave the government to exercise rights over those shares  
18 before it acquired them that really is the gravamen of the  
19 complaint and our compliance with that law. There's no  
20 commercial activity associated with that.

21 One may say, well, a shareholder voting or not voting  
22 is commercial activity. Argentina was not the shareholder;  
23 Repsol was the shareholder. Argentina was not voting as a  
24 shareholder. It was not acting as a shareholder. Pursuant to  
25 the law, it was granted the rights that Repsol had to vote

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1 those shares. That's a quintessential sovereign act. So we  
2 think the analysis as to YPF on foreign sovereign immunity is  
3 somewhat different.

4 THE COURT: The act of voting is a sovereign act?

5 MR. HALL: The act of --

6 THE COURT: I thought the test was whether it was an  
7 act that only could be exercised by a sovereign. You know, for  
8 counsel's example, Carl Icahn could vote the shares. Doesn't  
9 sound very sovereignty to me.

10 MR. HALL: But Carl Icahn cannot pass a law giving him  
11 the right to vote somebody else's shares. Only a sovereign can  
12 do that, and that's what's at issue here.

13 MR. HANSEN: But it really isn't what happened here,  
14 your Honor. It's really important, I think, the very quote  
15 that Mr. Hall read. If what he read said we get the right to  
16 vote these shares and nobody can stop us, he'd have an  
17 argument, but what he read said "shall exercise the rights  
18 conferred upon the shares." They're preexisting rights  
19 conferred upon those shares. Those shares exist in a  
20 corporation that's left undisturbed. They're just taking those  
21 rights, but those rights are encumbered because they haven't  
22 taken away any of the encumbrances.

23 And other than this implied or penumbral expropriation  
24 argument, they have nothing to say to that. So, sure, they can  
25 take the shares, that's great. But they've left the commercial

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1 arrangements in place, and they've got a commercial -- again,  
2 it's a commercial company with commercial obligations to comply  
3 with their contracts. And just like Carl Icahn, or anybody  
4 else, they've got to do it. This isn't declaring war. This  
5 isn't hunting down a fugitive. This is running a corporation.

6 THE COURT: You're saying it's an activity that any  
7 Tom, Dick, and Harry could exercise?

8 MR. HANSEN: Absolutely, your Honor, and deliberately  
9 so. I think that's important to keep in mind. This isn't a  
10 footfall. Argentina had a very clever strategy here to try to  
11 keep its tab down. We'll take 51 percent of the shares, and  
12 they want to pay 5 billion for that. But we're not going to  
13 take anymore because we don't want to pay for it. We're just  
14 going to kind of go in and take our -- but, okay, that strategy  
15 has consequences. Leaving the company in place, leaving its  
16 commercial obligations forged over 20 years of investor  
17 protection, they can't just then turn around and say: By the  
18 way, we're going to pick and choose among the remaining  
19 contractual obligations, and we'll comply with the ones we  
20 think are okay; and the ones we find a little meddlesome, we  
21 won't comply with them. No court has ever accepted that  
22 argument. There's no inconsistency as a matter of fact, but  
23 even as a matter of law, inconvenience, inconsistency is not a  
24 basis for finding activity noncommercial. As you say, your  
25 Honor, it's only activity that only a sovereign could do.



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1           And, again, going back to the exchange we had earlier,  
2           you put the hard case. If you say, Mr. Hansen, if they took  
3           all the shares, how would that be? Again, only a sovereign can  
4           seize shares. I agree with you on that. We had our discussion  
5           about that. It's very important that that didn't happen here.  
6           All they did was step in the shoes of a shareholder, and any  
7           Tom, Dick, or Harry can do that.

8           THE COURT: Mr. Hall.

9           MR. HALL: One final point on foreign sovereign  
10          immunity. We disagree it's commercial activity. Even if it  
11          was, the act of voting in Argentina had no direct effect on the  
12          United States. They argue, well, the tender offer was going to  
13          be made here. The purpose of 7(h), as they set forth in the  
14          papers, was to give the acquirer incentive to comply with the  
15          takeover requirement such that if it didn't, it was deprived of  
16          rights. Well, the argument, I suppose, is that had we -- I  
17          don't know how we would have blocked Argentina from voting.  
18          Our majority shareholder went into court in Argentina and tried  
19          to block it but was unsuccessful. But assuming there was a way  
20          for us to stop the government from voting those shares, their  
21          argument, I suppose, is that might have caused Argentina to  
22          reconsider whether it should make a tender offer.

23          That's simply not a direct effect, your Honor. The  
24          Court in *Weltover* said a direct effect is if it follows as an  
25          immediate consequence of the defendant's activity. The

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1 immediate consequence of voting or not voting at a  
2 shareholder's meeting would not have been a tender offer; and,  
3 therefore, there was no commercial activity that had direct  
4 effect in the U.S.

5 The last point I make, your Honor, is on causation.  
6 Again, I think our argument is different than Argentina's. The  
7 breach we allegedly committed was not enforcing Section 7(h) on  
8 June 4, 2012, at the annual shareholders' meeting. The  
9 complaint alleges that Petersen was foreclosed upon in May. No  
10 causation of any damages caused by a later brach.

11 MR. HANSEN: I think we've already discussed that,  
12 your Honor. We say in our complaint -- at this stage I think  
13 our complaint controls -- had they complied with their  
14 obligations, both YPF and Argentina, billions of dollars would  
15 have been coming our ways. We would have had no problem with  
16 anybody.

17 As to his argument about direct effect, very simple,  
18 your Honor. They're on the hook both for not having tender  
19 happen and for not voting. Even if you could confine it to  
20 voting, had they done what the contract required them to do,  
21 Argentina would have done the tender because they would have  
22 wanted to vote. There would have been payments into the United  
23 States, shares would have been acquired, direct effect under  
24 *Weltover* and a plethora of cases. So it's not true to say  
25 there's no direct effect from nonperformance. Where a contract

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1 calls for performance in the U.S. and it's not done, that's a  
2 direct effect, and it all flows from the failure of the  
3 defendants to abide by the very protective scheme that they  
4 both agreed to.

5 THE COURT: May I ask you this. Counsel said, I think  
6 Mr. Domb said, there's no right to a dividend. Are we stuck  
7 with the complaint as it is now in that you allege that there  
8 would have been a dividend paid? Where are we on that?

9 MR. HANSEN: I think the complaint alleges that had  
10 they complied with their obligation, there would have been a  
11 dividend. I think that controls, but I don't think the case  
12 pivots on whether it does or doesn't. It's just one  
13 allegation.

14 I'm having a hard time understanding "stuck with,"  
15 your Honor. He has this counterfactual narrative about whether  
16 something would or couldn't. Our complaint says in a world of  
17 performance, dividends get paid, banks forebear because money's  
18 coming our way. The world looks good. In their  
19 countercomplaint narrative, they said: Oh, no, no, no, you  
20 guys are deadbeats. You never would have paid. Other people  
21 would have come crashing down around you. With all respect,  
22 your Honor, there's another day to talk about that. That's  
23 down the road when we do full factual discovery and have a full  
24 opportunity to ventilate the merits. I would submit to your  
25 Honor we're going to win that one because having \$2 billion

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1 coming our way, with or without dividends, we would have had no  
2 problem; there would have been ample funding for the banks and  
3 for shareholders, and that controls.

4 MR. HALL: Briefly about dividends, in the complaint  
5 it originally pled that the failure to take dividends was a  
6 breach by YPF. On page 20 of their opposition brief, they  
7 abandoned that argument and say, no, the damage is from other  
8 breaches. It's no longer a breach, the way I understand it,  
9 that they file against.

10 MR. HANSEN: I don't think any --

11 MR. DOMB: Sorry. I have a brief point I want to  
12 address. A few moments ago you said buying shares is anything  
13 that Tom, Dick, and Harry can do.

14 THE COURT: Yes, sir.

15 MR. DOMB: I just would point to the *EM Ltd.* case in  
16 the Second Circuit in 2007 where at issue were loans that  
17 Argentina had taken from the IMF. And, of course, borrowing  
18 money is something that any Tom, Dick, and Harry can do. But  
19 the Second Circuit said, no, when Argentina borrows from the  
20 IMF, that's something that only a sovereign can do. And by  
21 analogy, when a country expropriates shares and intervenes in a  
22 company to take it over, that's also something that only a  
23 sovereign can do.

24 THE COURT: Anything else on that?

25 MR. HANSEN: No, your Honor.

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1           THE COURT: Let me ask you one more questions, please,  
2 on these items, Mr. Hansen. How do you define the commercial  
3 activity that we're talking about here, and are you under the  
4 third prong?

5           MR. HANSEN: First and third, your Honor, first and  
6 third. I think first every bit as powerfully as the third.  
7 The commercial activity very simply, your Honor, is most  
8 clearly put in the failure of Argentina and YPF to comply with  
9 the contractual obligation which was left undisturbed by the  
10 expropriation law to tender for the shares.

11           But, your Honor, I would equally say that it's not  
12 only that, because that follows a long history of commercial  
13 conduct which is also relevant to this being commercial  
14 activity. In other words, it doesn't come out of a cabbage  
15 patch. It comes out of a context in which Argentina and YPF  
16 offered shares to the public, commercial activity; enacted  
17 bylaws that provided shareholder protection; ran the company as  
18 a commercial enterprise for 20 years; and then, forget about  
19 how they got their shares, breached their contractual  
20 obligations that they left in place and expressly left in  
21 place. All of that is commercial activity. So the basis for  
22 our claim is that, your Honor, and most --

23           THE COURT: Let me ask you this: Though under the  
24 first prong, why isn't the decision not to tender an activity  
25 in Argentina?

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1 MR. HANSEN: Well, I think it's --

2 THE COURT: It has to be; right?

3 MR. HANSEN: Well, no, your Honor. I think the way  
4 the cases shake out is this. And I want to get the cases in  
5 front of me. If it has substantial contact with the United  
6 States, it qualifies under the first prong. And so let's talk  
7 about that. Specifically, does the nonperformance here have  
8 substantial contact with the U.S.? I think that's the way to  
9 frame the question. So even if they decide --

10 THE COURT: I thought the question, though, is it  
11 based upon a commercial activity carried on in the United  
12 States by the foreign state?

13 MR. HANSEN: Yes, your Honor.

14 THE COURT: And you're telling me that the gravamen of  
15 your complaint is that the failure to make the tender offer,  
16 the decision not to make the tender offer took place in  
17 Argentina, didn't it?

18 MR. HANSEN: That's true in every case in terms of the  
19 decision, but I don't think it's the decision that's the key,  
20 your Honor; it's the performance. So I think under the cases  
21 we cite -- and I just want to get the cases before you -- under  
22 the first, it's basically commercial conduct, which we have,  
23 that has substantial contact with the U.S. In other words, not  
24 whether they decide to do something, does the commercial  
25 conduct have substantial contact with the U.S.? And what the

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1 cases have said --

2 THE COURT: Isn't that the third prong?

3 MR. HANSEN: No, that's direct effects. I got  
4 confused, your Honor, as well. The third prong says something  
5 that's completely outside the U.S. but has an effect on the  
6 U.S.

7 THE COURT: Right.

8 MR. HANSEN: The first prong is commercial conduct  
9 that has substantial contact, and I believe that's the language  
10 of the cases. So, for example, in *Atlantica* cited recently by  
11 the Second Circuit, we submitted that as supplemental  
12 authority, I'm sure the decision to offer shares in the U.S.  
13 was made outside the U.S., but the offering of the shares in  
14 the U.S. put it into the first prong. And the Second Circuit  
15 said that.

16 In *Gibbons* the Court said it doesn't matter whether  
17 you decide to do it outside of the U.S. If you're going to be  
18 performing -- a substantial aspect of the contract will either  
19 be performed or not performed in the U.S., that fits within the  
20 first prong. So then we go to the factual predicate. Were  
21 there substantial aspects of the contract that we say was  
22 breached to be performed in the U.S.? And the answer is  
23 absolutely, your Honor. It gets to all our points about the  
24 whole idea here in Section 7 of the bylaws, and I won't go  
25 through the litany. But as a matter of substance, they have to

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1 acquire shares that are here in the United States. Sixty-five  
2 of the 140 million shares they offered were held in the U.S.

3 THE COURT: I got it.

4 MR. HANSEN: So, again, the legal point that you asked  
5 me about is I don't think where the decision made is  
6 dispositive to the first prong. I think if we're claiming on a  
7 contract that requires substantial aspects of performance in  
8 the U.S., that qualifies, and it clearly does.

9 THE COURT: Yes, sir.

10 MR. DOMB: Your Honor, you're on the first clause, and  
11 Mr. Hansen cited *Atlantica* which was a recent Second Circuit  
12 case. There the Second Circuit expressly said we're not  
13 deciding this under clause one; we're deciding it only under  
14 clause three.

15 And in *Gibbons*, also cited by Mr. Hansen, that was  
16 Judge Ward in 1982 in this court, and he applied what the  
17 Second Circuit later in *Shapiro* said was the wrong standard  
18 because he applied basically a personal jurisdiction standard  
19 in terms of the connection with the U.S. which was improper.

20 So I happen to agree with your Honor that, for  
21 purposes of clause one, all of the relevant conduct happened in  
22 Argentina. I won't go into the other clause unless you have  
23 questions.

24 THE COURT: Okay.

25 MR. HALL: Your Honor, Mr. Hansen said when asked



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1 about the commercial activity, he said the failure to make the  
2 tender. Obviously, with YPF, if your Honor concludes we had no  
3 obligation to make that tender, then that cannot satisfy the  
4 jurisdictional test as to us.

5 Separately, when he was talking before about the third  
6 prong, whether voting or lack of voting in Argentina has direct  
7 effect in the U.S., he argued, well, had we prevented them from  
8 voting, the Republic would have made the tender. Well, I mean,  
9 that's pure speculation. There's no contractual obligation to  
10 make the tender; nothing in the complaint that would suggest  
11 that. They may have made a tender. Possibly. But that's not  
12 a direct effect.

13 THE COURT: Am I stuck with what the complaint says  
14 for today's purposes on that?

15 MR. HALL: Yes, your Honor.

16 THE COURT: Don't I have to credit that?

17 MR. HALL: Well, I don't know --

18 THE COURT: You're saying it's speculative.

19 MR. HALL: They don't allege that, your Honor. It's  
20 not alleged.

21 MR. HANSEN: It's certainly a fair inference from our  
22 complaint. I don't think "stuck with it" is the right term. I  
23 think our factual allegations control as to the first prong.  
24 *Gibbons* is still good law. We cited other cases at page 18 of  
25 our brief, including *American Construction Machinery v.*

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1     *Mechanised Construction of Pak*, Judge Keenan. So I believe  
2     we're right about the first prong. It's not where the decision  
3     is made, it's whether there's a contract requiring performance  
4     of some significant amount.

5             THE COURT: All right. May I ask you all some forum  
6     non conveniens questions, please. And, Mr. Domb, let me start  
7     with you, please.

8             I didn't see an awful lot on Argentina's being an  
9     adequate alternative forum, and I had some concern about the  
10    criminal charges against King & Spalding. What's the status  
11    there?

12            MR. DOMB: Right, your Honor, I'd like to address that  
13    one first, and then Petersen makes three others which I'd like  
14    to quickly address that go to the adequacy.

15            On the criminal charges, those arose out of a  
16    different case, an arbitration between completely different  
17    Spanish companies and Argentina. The principal of the  
18    plaintiff companies is in jail in Spain, having been sentenced  
19    to five and a half years for fraud. So the criminal complaint  
20    that we're talking about here arose out of a case where there  
21    was criminal activity.

22            The treasury attorney general of Argentina,  
23    Dr. Abonna, in February of 2015 made a complaint -- I don't  
24    know if that's the right word -- a criminal complaint in  
25    connection with that case against Burford and some of the

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1 principals in that case. Burford being the financing entity in  
2 that case. That was a few months before this case was filed.  
3 So I mentioned the dating just to let you know that it has  
4 nothing to do with this case. Dr. Abonna left -- is no longer  
5 in office. There was a presidential election in Argentina --

6 THE COURT: So I've heard.

7 MR. DOMB: -- last November. President Macri from a  
8 different party has appointed a different attorney general. My  
9 understanding, and I've tried to find out the latest for today,  
10 is that whatever investigation may be taking place is not  
11 public. And so even the treasury attorney general is not privy  
12 to anything that's going on. What I have been told is that the  
13 attorney general has never included King & Spalding in her  
14 allegations. And I would also say that accusations by an  
15 executive branch official or even a prosecutor's investigation,  
16 if there is one, don't implicate the independence of courts.

17 THE COURT: Well, if, as counsel argues, there were  
18 criminal charges asserted against lawyers for a company suing  
19 the Republic -- I'm obviously paraphrasing -- based on that  
20 representation, that does seem to me to be an issue about an  
21 adequate forum.

22 MR. DOMB: There have been no charges filed to my  
23 knowledge. I think that if King & Spalding lawyers or other  
24 people had been charged in Argentina with some criminal charge,  
25 they would know about it. At most, to the best of my

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1 knowledge, after inquiring specifically, there may be an  
2 ongoing investigation. Even our client, the attorney general  
3 and the ministry of economics and finance, don't know that. If  
4 there would be charges brought in the future, of course the  
5 defendant would be told about it.

6 I understand that in the arbitration this issue was  
7 raised by the claimants there represented by King & Spalding  
8 and that the arbitrators issued a very long decision in, I  
9 think, the spring -- I forget if it was March or April -- where  
10 they said it's unclear to us -- they said, first of all,  
11 Dr. Abonna, who was still in the office and representing  
12 Argentina in that case, has told us that her accusation did not  
13 include King & Spalding or the trustee in bankruptcy of the  
14 claimants. King & Spalding and the claimants say that they're  
15 not sure about that. We're not sure about that. They ordered  
16 Argentina not to make any more public statements about it, and  
17 they said to the claimants: If you have any more trouble,  
18 bring it back to us. And as far as I know, that's where it  
19 stands as of this spring, and there's nothing further.

20 I would say this, your Honor: Four courts that we  
21 cited here in the U.S. have found Argentina to have adequate  
22 courts. The Eleventh circuit, two judges here in this --

23 THE COURT: I'm certainly familiar with that. But,  
24 again, my concern is whatever the status of these charges are  
25 against the law firm.

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1 MR. DOMB: No charges have been brought, your Honor.  
2 At most, there was an accusation. You know, that would be like  
3 saying if the Justice Department had indicted Hillary Clinton,  
4 would that somehow bring into question the adequacy of U.S.  
5 courts or her ability to defend herself here or to act here?

6 THE COURT: It's completely different in that at least  
7 the allegation, the argument counsel, I think, is making -- and  
8 I'll ask him in a minute -- is that because of the lawyers'  
9 representation of a party opponent to the Republic, they were  
10 subject to this action.

11 Counsel, two things. Please tell me what the actual  
12 facts are as you understand them; and, secondly, do I have to  
13 take another look at it now in light of the election?

14 MR. HANSEN: Well, taking the second one first,  
15 Argentina's also promised to pay its commercial obligations  
16 when it issued the shares. So I wouldn't take much comfort  
17 from new governments in Argentina.

18 Here's what we understand to be the facts. And I  
19 don't hear Mr. Domb -- frankly, it confuses me only. He hasn't  
20 sorted anything out. Here's what we understand. We -- not we,  
21 but members of our team, Burford provides financing, and others  
22 were engaged in another attempt to collect commercial debt from  
23 the Republic of Argentina. A group of people showed up at a  
24 proceeding. Names were taken down, and every one of those  
25 people, including paralegals, your Honor, were told they were

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1 the subject of criminal investigation, criminal investigation  
2 in Argentina.

3 I'm sitting here with the Ho Declaration A where the  
4 attorney general, who Mr. Domb runs away from, basically talks  
5 about Judge Griesa as the enemy of Argentina and how King &  
6 Spalding's doing bad things. It's shameless. It's truly  
7 shameless. The only thing the lawyers did here was defend a  
8 client, represent a legitimate commercial interest, and yet  
9 they are under criminal investigation. That's just outrageous  
10 that they even try to defend that.

11 THE COURT: Am I supposed to take judicial notice of  
12 the election and changing administration?

13 MR. HANSEN: No. I think with respect to your Honor,  
14 I think you take as an undisputed fact that Argentina, our  
15 counterparty here where they're saying we should go to  
16 litigate, has told all the lawyers who have chosen to litigate,  
17 including our cocounsel and others on our team, that they're  
18 the subject of criminal investigation for pursuing a commercial  
19 claim. That's alone enough. No court has ever said you have  
20 to go into a place and face that risk.

21 I will tell you, your Honor, in 30 years of doing  
22 this, I've never had what I'm going to tell you happen to me.  
23 We had a very fine young lawyer who was a dual citizen,  
24 Argentina-U.S. We asked him to work on this case. He said: I  
25 won't put myself at risk, my family at risk, my safety at risk

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1 by having my name show up anywhere near this. That should end  
2 this, your Honor. Argentina's not an appropriate forum for  
3 this case.

4 THE COURT: Okay.

5 MR. DOMB: Your Honor, that's off-the-record  
6 hyperbole.

7 MR. HANSEN: It's truth.

8 MR. DOMB: That I don't think you need to accept.

9 MR. HANSEN: It's truth.

10 THE COURT: All right.

11 MR. DOMB: There have been no charges brought. This  
12 is an executive --

13 THE COURT: Okay. You told me that already. I got  
14 it.

15 What else did you want to talk about on forum non  
16 conveniens? One of the things I wanted to ask about is you  
17 talk about all these witnesses who are government ministers or  
18 were government ministers. I don't understand that any of them  
19 is unwilling to come to New York.

20 MR. DOMB: Well, there has been a change of  
21 government, your Honor.

22 THE COURT: I'm aware of that.

23 MR. DOMB: I think people mentioned Minister  
24 Kicilloff, and I forget the other names, are no longer part of  
25 the government. But the point is that --

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1           THE COURT: Don't you have to make a showing that  
2 these folks are unwilling to appear voluntarily?

3           MR. DOMB: Well, many --

4           THE COURT: I think you do.

5           MR. DOMB: We have not gone person by person. We have  
6 not asked Mr. Kicilloff if he's willing to appear. The point  
7 we have made is that all of the witnesses are in Argentina.  
8 Some may be willing to appear, undoubtedly.

9           THE COURT: Who would not want to come to New York,  
10 counsel?

11          MR. DOMB: Undoubtedly, some will not want to appear.  
12 Believe it or not, I think you know many people just don't like  
13 to testify. There are no witnesses in the United States.  
14 There are no material issues about facts here.

15          I want to also address, your Honor, just to set the  
16 record straight on the adequacy, there are several other  
17 arguments that they make about filing fees, that discovery is  
18 limited, and all of those things. That has been shut down  
19 repeatedly by the courts. And also broad allegations of  
20 somehow lack of independence by the judges. I don't want to  
21 take up the Court's time, because we've been through it, but  
22 they make those accusations through an Argentine lawyer named  
23 Naveira. We responded to it with our lawyer named Errecondo.

24          In addition to those responses by Errecondo, I would  
25 make two other points, couple of other points. Judge McMahon



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1 said in *Cortec* in 2008, this was a case cited by Petersen:

2 "The Second Circuit has been reluctant to find foreign courts  
3 corrupt or biased absent some particularized showing of  
4 wrongdoing."

5 As to discovery, Judge Rakoff in 2001 in the *Aguinda*  
6 case said the notion that differences in civil law systems,  
7 including tighter restrictions on discovery render inadequate  
8 in any fundamental sense the civil law system employed by  
9 Ecuador, by most other nations in South America, and by most  
10 nations of Europe is insulting to those nations and absurd on  
11 its face.

12 And one other point is that Petersen itself has  
13 litigated in Argentina multiple times. Our expert,  
14 Dr. Pistarini, cited a bunch of those cases. And he cited one  
15 in particular, a tax case where Petersen prevailed on a tax  
16 refund against the Republic. It went all the way to the  
17 Supreme Court. It was affirmed. And also cited, Errecondi  
18 cited, five or six cases where the Republic was a defendant in  
19 Argentina and lost. And those cases took approximately three  
20 to four years, according to his affidavit.

21 So I know that you focused first on the question of  
22 the King & Spalding lawyers, but I wanted to emphasize that all  
23 of the other stuff that they say about the supposed adequacy of  
24 the courts has been rejected by courts, and there's no factual  
25 predicate for it.

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1 MR. HANSEN: Very simply --

2 THE COURT: Counsel.

3 MR. HANSEN: Very simply, your Honor, and I think I  
4 can dispense with this very quickly. The courts that have  
5 found Argentina an appropriate and adequate forum haven't  
6 involved suits against Argentina. Every one of those cases  
7 have been litigated here. And, indeed, in the *Weltover* case,  
8 which went all the way to the Supreme Court, Argentina sought  
9 forum non conviens, and it was denied. No court has said  
10 Argentina is an appropriate place to go sue Argentina.

11 Secondly, your Honor, the only factor, when you get  
12 past the fact that we all have to face criminal prosecution and  
13 jail for being lawyers for a party, when you get past that,  
14 which I don't think you can, the only factor they even argue on  
15 a conveniens scale is witness travel. It's an airplane flight.  
16 Judge Newman made a very trenchant observation in a case we  
17 cited. It's the modern era. People get in airplanes all the  
18 time.

19 THE COURT: What do you say to counsel's suggestion  
20 that your client has prevailed against the Republic in various  
21 lawsuits in Argentina?

22 MR. HANSEN: I'm not aware of any suit directly  
23 challenging the government like this in Argentina, and I don't  
24 think it would matter. The mere fact that we could have  
25 litigated in Argentina doesn't make it a superior alternative

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1 forum for this case under these circumstances. And, again,  
2 it's their burden. We're the plaintiffs. We have the right to  
3 bring a case where there's jurisdiction and venue. Those  
4 aren't contested. They have a strong -- they have a strong  
5 hill to climb. They have to show --

6 THE COURT: It's not so strong because your client  
7 really doesn't have any ties to New York. It's not quite as  
8 steep as it usually is; right?

9 MR. HANSEN: Your Honor, I think it is steep because  
10 so much of this case is about New York. The whole nexus of  
11 this case is about a commercial obligation that was supposed to  
12 happen in New York.

13 THE COURT: Right. But the cases speak in terms of  
14 the contacts of the plaintiff with New York.

15 MR. HANSEN: Well, they also speak of having -- the  
16 movant has to show it's a superior forum.

17 THE COURT: I understand.

18 MR. HANSEN: The only thing they say is, well, it's  
19 easier to do witnesses in Argentina. It wouldn't be, your  
20 Honor. Nobody would be unwilling to come. They haven't  
21 identified a single witness unwilling to come.

22 THE COURT: I got it.

23 MR. HANSEN: There's another thing too, your Honor.  
24 It goes to the thing we rushed through a little bit. In  
25 Argentina we wouldn't even be able to cross-examine witnesses

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1 under oath. I don't know how that would be superior from a  
2 witness standpoint. I don't think it's disputed they don't  
3 have a process the way we do by having opposing witnesses  
4 confronted under oath. So not a single witness identified, no  
5 showing that the witnesses --

6 THE COURT: I got it.

7 MR. HANSEN: That's the only factor to argue.

8 MR. DOMB: Your Honor, on the first factor of forum  
9 non conveniens, how much deference the Court should pay, in its  
10 brief Petersen has one sentence on this. They don't seriously  
11 contest it, and for obvious reasons. The plaintiffs --

12 THE COURT: What about your burden? What about your  
13 burden here?

14 MR. DOMB: On that element?

15 THE COURT: On all of the factors.

16 MR. DOMB: Okay. So skipping to the public and  
17 private interest factors, I have a quick list that,  
18 number one --

19 THE COURT: Counsel, I don't need you to read them to  
20 me. Is there something you want to talk to me about?

21 MR. DOMB: Yes.

22 THE COURT: Okay.

23 MR. DOMB: Mr. Hansen said it's just a matter of air  
24 travel, which is absurd. There's a whole host of the factors  
25 that the Court should look at. The claim is based entirely on

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1 bylaws of an Argentine corporation. The defendants are a  
2 foreign country and a company incorporated in Argentina. The  
3 named plaintiffs, Petersen, have no connection to the U.S. In  
4 fact, ultimately, they were owned by an Argentine family.  
5 Their only connection is that they -- the shares they happened  
6 to buy from Repsol were held in the New York Stock Exchange  
7 instead of the Buenos Aires Stock Exchange. Those shares are  
8 treated identically in both exchanges.

9           The real party in interest here is Burford, which  
10 wants to about get 70 percent of any recovery. The events at  
11 issue -- and this is as alleged in the complaint -- took place  
12 almost entirely in Argentina. The takeover decree in April,  
13 the expropriation law in May, the actual expropriation in 2014,  
14 the lack of a dividend payment in May, that happened in a  
15 boardroom in Argentina. The interpretation of YPF's bylaws, I  
16 said before, are a matter of Argentine law. Not only are most  
17 witnesses located in Argentina, whether they'd be willing to  
18 come here or not, there are no witnesses in the U.S. on any  
19 material issue. The business about the flight is interesting.  
20 You know, I've taken that flight. It's about 11 hours. Most  
21 relevant documents are in Spanish. Many have not been  
22 translated.

23           Now let's look at the U.S. interests here. Do the  
24 U.S. courts and do U.S. jurors have an interest in the outcome  
25 of a complaint by foreign entities against a foreign government

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1 and a foreign corporation? Yes, the case has some tangential  
2 elements that I don't blame Mr. Hansen for emphasizing, a whole  
3 litany of New York stock-related things, but there's no issue  
4 Argentina's not accused of violating U.S. securities laws or  
5 regulations. If it had made a tender offer, yes, it would have  
6 had to be in New York.

7 THE COURT: I got it.

8 MR. DOMB: But it didn't. So it didn't violate any  
9 issues. And YPF shares, as we say, are trading normally in  
10 both exchanges.

11 So if you look at the whole list of both public and  
12 private interests, I think it's overwhelmingly in favor of  
13 Argentina.

14 THE COURT: Anything else?

15 MR. HANSEN: Just briefly, your Honor. Witnesses  
16 we've dealt with. That's the only factor that really -- in  
17 terms of public interest, the *Lafarge* case is instructive.  
18 Again, I'm not going to give a speech about the love of New  
19 York, but New York is the commercial capital of the world, your  
20 Honor. The parties deliberately chose to make New York the  
21 situs of their commercial --

22 THE COURT: That's what the Supreme Court told us,  
23 that that was somewhat of a speculative interest, much as I am  
24 in favor of it, of course.

25 MR. HANSEN: It's not speculative here, your Honor.

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1           THE COURT: That's what the Supreme Court said,  
2           though.

3           MR. HANSEN: But I don't think -- not in this context,  
4           your Honor. I think it is a valid factor in terms of the  
5           interest at issue here. This case was about doing a tender in  
6           New York, and New York has an interest in seeing to it that  
7           people from all over the world can come here and get commercial  
8           predictability, rule of law, all those things. It's not an  
9           accident the parties chose to site their commercial conduct  
10          here, because it could rely on it. That's how Argentina got  
11          the billions of dollars in the first place.

12          To say that New York doesn't have interest, New York  
13          has a central interest, a central interest. And, again, it is  
14          their burden to show substantially more convenient. They  
15          haven't come close to doing that. Again, we don't get over the  
16          first hurdle because I think it would be outrageous to make  
17          lawyers --

18          THE COURT: I got it. I got it.

19          Is there anything else you want to tell me about  
20          causation here? I think it all goes to --

21          MR. DOMB: I don't want to repeat myself.

22          THE COURT: That was my question. Anything in  
23          addition?

24          MR. DOMB: Okay.

25          THE COURT: Anything else?

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1 MR. HANSEN: No, your Honor.

2 THE COURT: Okay. On promissory estoppel and good  
3 faith and fair dealing, why are those not duplicative? I don't  
4 understand why we have those here, those claims.

5 MR. HANSEN: We've pleaded them, your Honor. We  
6 believe they're valid under Argentinian law.

7 THE COURT: I know you've pleaded them. I got that  
8 part. Why are they not duplicative, improperly duplicative, of  
9 the breach of contract claim?

10 MR. HANSEN: I think in the event -- well, I pleaded  
11 it in the alternative, I guess. As I understand it, promissory  
12 estoppel exists when the contract isn't held valid. If for  
13 some reason the contract wasn't valid, there would be an  
14 alternative basis for enforcing this under estoppel principles.

15 THE COURT: So you say --

16 MR. HANSEN: Pled in the alternative.

17 THE COURT: All right. Anybody want to add anything  
18 to that?

19 MR. HALL: Just, your Honor, that the alleged promises  
20 made in public filings stated nothing more than here's what the  
21 bylaws said. So if there's not a breach of the bylaws, then  
22 there couldn't be any breach of the so-called promissory  
23 estoppel.

24 MR. HANSEN: I would add, your Honor, there are also  
25 promises in the prospectus that might give rise to liability.



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1 They're independent of the bylaw contracts, so that could also  
2 be a basis for promissory estoppel even if not one of the  
3 contract.

4 THE COURT: All right. Anything else you want to  
5 leave with me, counsel, that you haven't said before?

6 MR. HANSEN: Your Honor, just our thanks for so much  
7 time and attention to the case.

8 THE COURT: Oh, you say that to all the judges,  
9 counsel.

10 MR. HANSEN: I do, your Honor.

11 MR. DOMB: I think I've said my piece. Thank you,  
12 your Honor.

13 MR. HALL: Nothing, your Honor, other than just to  
14 emphasize that please try to distinguish the claims against YPF  
15 which really are different. We agree with the Republic's  
16 arguments, but there are distinct claims, including 7(h), made  
17 against my client.

18 THE COURT: Let me just ask you that. At this stage,  
19 at the pleading stage, what kind of burden is there on, I  
20 guess, the plaintiff in pleading what, at the end of the day,  
21 would turn out to be the final determination of who did what to  
22 whom and what was required where? Your point that, for  
23 example, the only obligation that the company had was under  
24 7(h), do I have to decide today if that obligation was  
25 nullified by the Republic's action, or am I stuck with the

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1 pleading?

2 MR. HALL: I think you have to decide that today, your  
3 Honor. I think you have the documentary evidence which should  
4 be considered, including the bylaws. I think you have the  
5 foreign law affidavits which I think advise your Honor what  
6 Argentine law says on the subject. I think you can decide that  
7 today, your Honor.

8 THE COURT: Counsel.

9 MR. HANSEN: You certainly can't decide it today  
10 against us, your Honor. I think, on our complaint and what's  
11 before you, you could decide it for us. I don't think you have  
12 to. I think we've pleaded a cause of action. Again, under  
13 pleading rules this case goes forward. There's no basis they  
14 can say as a matter of law they win.

15 THE COURT: I think, among other things, counsel does  
16 say that based on his expert's affidavits, the obligation under  
17 7(h) would be public law -- I'm sorry, private law that would  
18 be inconsistent with the public law. And counsel says that's  
19 something that can and should be decided now.

20 MR. HANSEN: And our response to that, your Honor, our  
21 experts say the exact opposite, and their experts don't cite to  
22 some text that you could read. So it's almost like contract  
23 interpretation. You can't decide on the face of the law who's  
24 right. At best for them, it's somehow ambiguous and requires  
25 further exploration. It can't be decided today that that's

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1 right. It can't. There's not enough material to do that.

2 MR. HALL: Your Honor, there certainly is. Our  
3 experts do do a comprehensive analysis that cite to Argentine  
4 juris prudence supporting their views. Compare it to their  
5 experts. Completely conclusory with no analysis whatsoever on  
6 these points.

7 THE COURT: All right. Counsel, thank you. You're a  
8 complete and utter delight. Your papers were wonderful. It's  
9 a pleasure to have you. Reserved.

10 MR. HANSEN: Thank you very much, your Honor.

11 (Adjourned)